IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1469

WILFORD D. CARTER,
Petitioner,

versus

L. E. HAWSEY, JR., Judge
14th Judicial District Court
Division F,
Respondent.

OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE 14TH JUDICIAL DISTRICT COURT OF LOUISIANA

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STATEMENT OF THE CASE

Petitioner was found in contempt of the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, on December 8, 1977, as a result of his having called Judge L. E. Hawsey, Jr., Division F of that Court, by several derrogatory terms set forth in petitioner's brief. The contemptuous conduct took place in the office of Judge Hawsey while he was serv-

ing as duly appointed Order Signing Judge for the Court. Petitioner was in Judge Hawsey's office to see him in his official capacity as Order Signing Judge, and his contemptuous words were overheard by Judge Hawsey's secretary and another local attorney who was waiting his turn to present matters to the Judge in his capacity as Order Signing Judge.

Petitioner's contemptuous behavior was not dealt with on the spot, but rather, petitioner was ordered into Court the next day, was given an opportunity to explain his conduct, and was given a punishment for direct contempt.

Petitioner's complaint as to his being barred from further practice in Division F before Judge Hawsey is moot, as noted by the Louisiana Supreme Court in its Order dated March 7, 1978.

In his statement of the case, petitioner cited a portion of the transcript of the hearing of December 8, 1977, before Judge Hawsey, alleging that it shows bias against him on the part of the Judge. Those portions of the transcript, however, must be considered in light of other portion of the transcript which explain the comments made by the Court.

[Questioning by Mr. Carter.]

"Question: Mr. Van Norman, you're lying. Now, Mr. Van Norman, I don't know what type or how much affection or dignity you have, you know, I don't know if you realize —

The Court: Restrict your remarks to questions, Mr. Carter. Restrict your remarks to questions and answers.

Question: Mr. Van Norman, you did not hear me curse that Judge. Now, you're lying if you said you did. You did not hear me curse the Judge at all, because I didn't say one mumbling cursing word. Now, why is it that you stand, sitting on this bench and lying, saying you heard me curse him?"

Questioning Mr. Van Norman further, Mr. Carter said:

"Well, you're a good liar, I'll tell you that at this time."

Later, Mr. Carter, again questioning Mr. Van Norman, said:

"Mr. Van Norman, we both didn't expect what happened. I didn't expect you to come and lie in this Court."

APPLICABLE STATUTES

Article 222 of the Louisiana Code of Civil Procedure defines direct contempt in pertinent part as follows:

"A direct contempt of Court is one committed in the immediate view and presence of the small court and of which it has personal knowledge, or a contumacious failure to comply with a subpoena or summons, proof of service of which appears of record.

Any of the following acts constitutes a direct contempt of court:

(1) Contumacious, insolent, or disorderly behavior toward the Judge, or an attorney or other officer of the court, tending to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority;

(2) Breach of the peace, boisterous conduct, or violent disturbance tending to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority . . . ."

Article 223 of the Louisiana Code of Civil Procedure provides for punishment of a direct contempt as follows:

"Any person who has committed a direct contempt of court may be found guilty and punished therefor by the court forthwith, without any trial other than affording him an opportunity to be heard orally by way of defense or mitigation. The court shall render an order reciting the facts constituting the contempt, adjudging the person guilty thereof, and specifying the punishment imposed."

Louisiana Revised Statutes 13:4611 provide for the punishment of contempt of court in pertinent part as follows:

"Except as otherwise provided by law:

(A) The Supreme Court, the Courts of Appeal, the District Courts, Juvenile Courts and the City Courts may punish a person adjudged guilty of a contempt of court therein as follows:

[1] For a direct contempt of court committed by an attorney at law, a fine of not more than $100.00, or by imprisonment for not more than 24-hours, or both . . . ."

During the course of the hearing afforded petitioner by Judge Hawsey, petitioner made an oral motion to have Judge Hawsey recuse himself. The recusation of Judges in civil trials is governed by Louisiana Code of Civil Procedure, Article 154, which provides as follows:

"A party desiring to recuse a Judge of a District Court shall file a written motion therefor assigning the ground for recusation. This motion shall be filed prior to trial or hearing unless the party discovers the facts constituting the grounds for recusation thereafter, in which event it shall be filed immediately after those facts are discovered, but prior to judgment. If a valid ground for recusation is set forth in the motion, the Judge shall either recuse himself, or refer the motion to another Judge or a Judge Ad Hoc, as provided in Articles 155 and 156, for a hearing."

REPLY TO PETITIONER'S SPECIFICATION OF QUESTIONS FOR REVIEW

Recusation

As his first of four questions to be presented to this court, petitioner asks:

> "1. Whether, in the circumstances of this case, the Trial Judge could not impartially sit in judgment of contempt charges against the petitioner, should he have recused himself."

It is noted, initially, that petitioner did not raise the question of recusation as required by the Louisiana Code of Civil Procedure. The grounds for his motion to recuse were, or should have been, evident to him prior to the hearing, and he did, in fact, file several written motions at the hearing. He did not, however, file a written motion to recuse. It has been held by the Louisiana Supreme Court that the requirement that the motion be in writing is essential. In *State v. Crothers*, 278 So.2d 12 (La.Sup.Ct. 1973), the court refused to review the denial of an oral motion to recuse, saying:

> "The motion to recuse urged by defense counsel was not in writing as required by Louisiana Code of Criminal Procedure, Article 674. Therefore, the denial of the oral motion for recusal presents nothing for this court to review."

The recusal provision of the Louisiana Code of Criminal Procedure, Article 674, is the same provision as Article 154 of the Code of Civil Procedure.

We are involved here with a direct contempt. The Louisiana statute does not require that a direct contempt be committed in *open* court. In this case, the contemptuous conduct took place before the court in chambers and in the presence of not only the Judge, but other court personnel and another lawyer waiting to consult the court on business matters. The Louisiana Statute considers as direct contempt any "contumacious, insolent or disorderly behavior toward the Judge" without any restriction on whether the conduct is committed in open court or in chambers.

Judge Hawsey was acting in his official capacity as Judge of the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana, Division F, at the time of the contemptuous conduct and that conduct clearly constituted a direct contempt.

Louisiana Civil Code, Article 223, provides the procedure for punishing a direct contempt, in pertinent part, as follows:

> "A person who has committed a direct contempt of court may be found guilty and punished therefor by the court forthwith, without any trial other than affording him an opportunity to be heard orally by way of defense or mitigation. . . ."

In this case, the Trial Judge before whom the direct contempt was committed gave petitioner an opportunity to be heard orally by way of defense and mitigation. That opportunity followed the direct contempt by one day. That delay is not constitutionally forbidden and does not then require the referral of the matter to another Judge for hearing.

Petitioner has not complained of the constitutionality of the Louisiana Statutes defining direct contempt, the procedure for punishing or the punishment to be imposed. Rather, he complains only that in this case, the failure of the Trial Judge to recuse himself violated his constitutional rights.

The subject of contempt is one which does not lend itself to easy categorization. The facts of each case are all-important.

We are not here faced with an *Offutt* situation in which the Trial Judge and counsel become open adversaries over the course of a trial (*Offutt v. U.S.*, 348 U.S. 11, (1954)), nor are we dealing with a *Mayberry* situation in which an individual grossly violates the decorum of the court in open session, apparently in an attempt to disrupt the orderly judicial process. (*Mayberry v. Pennsylvania*, 400 U.S. 455, (1971))

As observed by the court in *Mayberry*, "Generalizations are difficult." *Id.* at 462. It appears, however, that the conduct involved in this case was not so flagrant as to provoke intemperance in the Trial Judge, nor did the relationship degenerate to one of adversary confrontation.

In this regard, it is noted that the references by petitioner to articles in the Lake Charles American Press constitute references to materials which are outside of the record in this proceeding and which report events that took place after the determination on this contempt rule. The newspaper stories are primarily hearsay detailing of events and would hardly be admissible under any circumstances.

The sole issue for consideration here is whether the Trial Judge, having delayed action on the direct contempt of petitioner in order to permit petitioner an opportunity to be heard orally by way of defense and mitigation, was then constitutionally required to step aside and allow the contempt proceeding to be conducted before another Judge. We think the decisions of this Court answer the question in the negative.

In *Sacher v. U.S.*, 343 U.S. 1 (1952), Mr. Justice Jackson wisely observed:

> "If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment. We think it less likely that unfair condemnation of counsel will occur if the more deliberate course be permitted."

As recognized by this court in *Mayberry:*

> "It is, of course, not every attack on a Judge that disqualifies him from sitting."

Ours is not a case of continued insolent conduct. It is not one of a nature to arouse undue passions or prejudices in the Judge. It is not one in which the prescribed procedure was abused. It is not one in which any excessive fine or punishment was imposed. Petitioner has not shown any justification for his assertion that the Trial Judge should have recused himself from con-

duct of the hearing at which the trial Judge afforded him the opportunity of being heard orally by way of defense or mitigation.

The traditional rule that a Trial Judge need not recuse himself from a contempt proceeding to punish a direct contempt committed in his presence if he does not immediately impose sentence carries with it the substantial justification expressed in *Sacher*, that is, where there is no indication the Judge has become personally embroiled, he may afford the contempt nor an opportunity to be heard in defense and mitigation, and may act with cool deliberation and with benefit of hindsight, and not be put in the position of having to make a "snap" decision on an important matter.

The rule has further logical support. Requiring a contempt proceeding to be tried before another Judge in the case of a direct contempt, but not one so as to enflame the prejudice or passion of the Trial Judge, encourages the court to take an adversary position. The Judge before whom the contempt was committed must then become an advocate of the dignity of the court and must assume an adversary position with regard to the party accused of contemptuous conduct. On balance, a rule permitting the Trial Judge to impose a penalty for a direct contempt only if he acts immediately puts that Judge in the position of *reacting* immediately, rather than *acting deliberately* after passions have cooled and explanations have been made, and forces him to do so on pain of becoming an adversary in a separate judicial proceeding.

Due Process

Petitioner raises as his second question the following:

> "When an alleged contempt has been committed by an attorney in the presence of the Trial Judge and the Trial Judge proceeds by rule to show cause to punish for contempt whether, due process requires that the attorney be given an opportunity to employ counsel, subpoena witnesses, and prepare a defense, consistent with the Sixth Amendment guarantee of effective assistance of counsel and the Fourteenth Amendment's guarantee of due process of law?"

First, as regards petitioner's complaint that he was not told of the nature of the proceedings against him, the transcript reflects that during the course of the hearing, and at the time when petitioner first asked the court under what authority he was being held in direct contempt of court, the court responded to the questions as follows:

> "Mr. Carter: Excuse me, Your Honor, I asked that the Court, in regards to — the Court has already indicated that I'm being held in direct contempt. Is that correct?
>
> The Court: That is absolutely correct.
>
> Mr. Carter: Will the Court venture to tell me under what section that direct contempt statute — Article 21 of the Code of Criminal Procedure, what paragraph I've been held —
>
> The Court: You've got the wrong book, Mr. Carter.

Mr. Carter: Code of Criminal Procedure — Code of Civil Procedure?

The Court: Yes, sir.

Mr. Carter: Under what section, what paragraph?

The Court: Article 224, sub-section — excuse me, 222, subsection 1."

With regard to the remainder of petitioner's argument under this question, this court has not traditionally imposed the requirement of right to counsel where, as here, a direct contempt has been committed by an attorney and the possible penalty does not extend to substantial fine or imprisonment. Petitioner has not cited any decision of this court imposing such a requirement in a direct contempt case involving an attorney.

Insofar as the right to confront witnesses is concerned, there is no showing in the record that any witnesses to the contemptuous conduct other than petitioner, the Judge, his secretary and the attorney who was waiting to transact business with Judge, all of whom were called and testified at the hearing, offered petitioner by way defense and mitigation.

Petitioner committed what the Louisiana Statute defines as a direct contempt of the court by contumacious, insolent and disorderly behavior toward the Judge while the Judge was exercising a function of the court. Petitioner has not attacked the constitutionality of the direct contempt statute at issue, nor of the statute prescribing the procedure for

punishing, which permits subsequent hearing by way of defense or mitigation. The cases cited by petitioner are not relevant because they deal either with a definition of direct contempt limited to contempts committed in open court or with contempt cases involving major punishments, both of which this court has subjected to different rules.

Notice

Petitioner raises as the third question in connection with his application of writ of certiorari, the following:

"May a conviction for contempt be sustained where the Trial Judge did not give contempt nor timely notice of the specific conduct that forms the basis of the contempt prior to the hearing of the contempt rule, and where the Trial Judge never in his contempt proceedings stated the specific contumacious conduct that forms the basis of the contempt charge?"

Petitioner is in error in stating that he was convicted under the provisions of Louisiana Code of Civil Procedure, Article 225. As set forth earlier, petitioner was advised that he was in direct contempt of court under the provisions of Louisiana Code of Civil Procedure, Article 222, and the procedure for punishing him under that Article was the procedure specified in Louisiana Code of Civil Procedure, Article 223. Both of those Articles have been cited above for the court.

A review of petitioner's brief leaves no doubt that he was aware that his calling the Judge a racist was a basis for the contempt proceeding.

Petitioner has not directed the attention of this Court to any decision by which it has required specification of the charges in connection with a direct contempt proceeding, delayed only a short time to permit the party being held in contempt to be heard by way of defense or mitigation.

The closing statement of petitioner made before Judge Hawsey on December 8, 1977, at the hearing held to afford him an opportunity to present matters by way of defense and mitigation contained the following language:

> "I said, Your Honor, I think I know why, and I wasn't hollering. I said, I think I know why you're behaving this way. I think it's because you have a reason for it, and your reason is that you're a racist, and I didn't really say it loud, and I said it because at that time, I felt that the Judge was being exceptionally peculiar and particular with me as he have been with other attorneys, as he have been with me in the past. So, at that point, the Judge said, call the Sheriff's Department, and I walked out from the Judge's office and went immediately across upstairs to — I believe I saw Mr. Gillard, Ray Gillard, and I told him that I was going to have to go down and post or sign a recognizance bond of some sort, sign some sort of recognizance or a bond, and he walked

> down across the street to the jail with me, and I signed a bond."

Petitioner used contemptuous language to the Trial Judge in chambers to provoke a confrontation and hopefully a discussion of what he perceived to be differences with the Judge, under the mistaken belief that he was protected since the remarks were not made in open court. That mistake does not relieve him of the contemptuous nature of his words or free him from any of the strictures of direct contempt. He was aware of his provocation, he was given an opportunity to be heard by way of defense and mitigation.

Direct Or Constructive Contempt

Petitioner raises as his question four, the following:

> "Whether the obstructive conduct of petitioner which forms the basis of contempt charges can be punishable as contempt when said conduct occurred out of the court's presence and hearing while court was not in session or recess?"

The Louisiana Statute under which petitioner was found in direct contempt has not been challenged by petitioner as being unconstitutional. He has demonstrated no constitutional prohibition against defining a direct contempt of court to include "contumacious, insolent, or disorderly behavior toward the Judge" as provided in the cited statute.

The statute very definitely and particularly defines conduct which may constitute a direct contempt. There is no question that the contemptuous conduct in this case falls within the definition of direct contempt. Petitioner's conduct in this case may be considered either "contumacious, insolent, or disorderly behavior toward the Judge" or "breach of the peace, boisterous conduct, or violent disturbance tending to interrupt or interfere with the business of the court". It was not committed in open court. It was committed before the Judge in chambers while he was performing duties assigned him by the court, duties required as a function of the court. The statute simply does *not* limit direct contempt to contempt committed only in open court.

The cases cited by petitioner in support of his argument on this question are not applicable. *Bland v. Kennamer*, 6 Fed. Rptr. 2d 130 (8th Cir. 1925) dealt with the definition of the term "court" within the context of a specific statute and has nothing to do with contempt. *Bosworth v. Marshall*, 176 SW 348, similarly deals only with a general definition of the term "court".

Louisiana Educational Assn. v. Richland Parish School Board, 421 F.Supp. 973 (W.D. La. 1976) dealt with a constructive contempt for an alleged violation of an order of a Federal District Court committed by a party to an order which the court had issued. It is neither factually or legally applicable to this case. *State ex rel. Collins v. Collins*, 110 So.2d 545 (La.Sup.Ct. 1959) similarly dealt with a constructive contempt of a state court order committed by one of the parties to a child custody proceeding. It is not factual-

ly or legally applicable to this case. Petitioner relies on the distinction drawn by that court between direct and constructive contempts where the Supreme Court stated that:

> "The direct contempt is committed in the presence of the court and consists of words spoken or acts committed while the court is in session, or during its intermissions, which tend to subvert, embarrass or prevent justice."

It is very important to note, however, that the *Collins* case was decided in 1959, and the offending conduct took place in 1958. The Louisiana Code of Civil Procedure, including Article 222, was enacted by the Louisiana Legislature in 1959 and became effective on January 1, 1960. Thus, the *Collins* case did not purport to interpret the definition of contempt under which the instant case is being considered.

The same observation pertains to petitioner's citation of *State ex rel. Stewart v. Reid*, 43 So. 447 (Sup.Ct.La. 1907), obviously a case decided prior to the enactment of Louisiana Code of Civil Procedure, Article 222.

Petitioner's citation to 28 U.S.C.A. Section 459 and an unnamed case at 11 F.2d 713 are also inapplicable. We are dealing here with a specific state statute defining contempt, a statute which has not been constitutionally attacked in this proceeding, and which clearly proscribes the offending conduct in this case. To reiterate, that statute does not require that contempt

occur in open court. On its face, it is applicable to the conduct at issue in the case at bar.

ARGUMENT

In the case at bar, petitioner committed a direct contempt of court as defined by Louisiana Code of Civil Procedure, Article 222 by engaging in disorderly behaviour toward Judge Hawsey in chambers while Judge Hawsey was conducting official business of the court. That conduct tended to interfere with the business of the court and constituted a breach of the peace and boisterous conduct sufficient to impair the dignity of the court and respect for its authority. That conduct took place not only in the presence of the Judge, but of his secretary and another attorney waiting to do business with the court.

Rather than react in the heat of the moment, Judge Hawsey, realizing the petitioner's youth and inexperience, delayed imposition of a penalty for contempt less than 24 hours in order to permit petitioner to be heard orally by way of defense or mitigation. Petitioner came to the hearing, cross-examined the only witnesses to the contempt, and made a statement on his behalf, after which punishment in accordance with the applicable statutory provisions was imposed. Punishment was the maximum, $100.00 fine and one day in jail.

The decisions of this court with regard to contempt indicate that it is a subject to be approached carefully and deliberately, requiring a careful balancing of the interests in maintaining the dignity of the court and

insuring that the power to punish summarily for contempt not be abused.

There should be no question that the conduct engaged in by petitioner, even according to his own version, was a direct contempt of court. The record fails to reflect that the contemptuous conduct constituted such a personal attack as to cloud the objectivity of the Trial Judge.

The facts of this case disclose no basis on which the delay of less than 24 hours in order to permit a hearing and to permit petitioner an opportunity to be heard by way of defense or mitigation imposed any more onerous burden on him than would have been imposed had the Trial Judge immediately opened court and imposed a similar sentence. Had that procedure been followed, in this case of an obvious direct contempt, presumably there would be no question at all of the propriety of the Trial Judge imposing the contempt punishment. Surely the very brief delay, which inured to petitioner's benefit by allowing him to be heard by way of defense and mitigation, cannot be said to have deprived him of any substantial right.

As argued earlier, requiring an instant punishment by the Trial Judge in order to avoid an adversary hearing before another Judge, can only encourage the Trial Judge to react, rather than act, encouraging snap decisions on matters which may require cool reflection, in order to avoid the possibility of becoming embroiled in further conflict.

CONCLUSION

The contempt decisions by this Court establish rules for various categories of contempt cases. Where the contemptuous conduct is repeated throughout the course of a trial and serious penalties are imposed, the contempt proceedings should be heard by a Judge other than the one before whom the contempts were committed. *Mayberry v. Pennsylvania*, 400 U.S. 455.

Where the contemptuous conduct embroils the Trial Judge into the extent that he becomes an activist seeking combat, another Judge should hear the contempt proceeding. *Offutt v. U.S.*, 348 U.S. 11 (1954).

In the case of "limited" punishment, a direct contempt committed by an attorney need not be punished immediately, but the court may allow a short period for consideration without requiring that the Judge before whom the contempt was committed step aside. *Sacher v. U.S.*, 343 U.S. 1 (1952).

It is interesting to note that the *Sacher* rationale has been applied by lower Federal courts. In *Greene v. Tucker*, 375 F.Supp. 892 (E.D. Va. 1974), petitioner appealed from a contempt sentence of ten days in jail and a $500.00 fine. Petitioner was an attorney practicing before the Bar who refused to proceed with the trial of a case scheduled for trial, in the face of an order by the District Judge, because he felt the Jury Venire was improperly constituted. He was cited for contempt during the course of the trial, but a hearing was not held, nor punishment imposed, until the conclusion of that trial several days later.

The court held that the case was subject to disposition by the Trial Judge on the authority of *Sacher*, saying further:

> "The exception to the general requirement of a full fact-finding hearing in cases of contempt committed 'directly under the eye or within the view of the court' is not grounded solely in the need for immediate vindication of the Court's integrity, but also supported by the fact that 'there is no need of evidence or assistance of counsel before punishment, because the court has seen the offense'. *Cooke v. United States*, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925). See 8a Moore's Federal Practice, Paragraph 42.02[3]. In such a case, the court may 'proceed upon its own knowledge of the facts and punish the offender, without further proof, and without issue or trial in any form.' Ex parte Terry, 128 U.S. 289, 309, 9 S.Ct. 77, 81, 32 L.Ed. 405 (1888)."

Where there is no reasonable basis shown in a request for a continuance of a hearing on a motion for continuance, its denial does not represent a violation of due process. Thus, in *Ungar v. Sarafite*, 376 U.S. 575 (1964), this Court affirmed a conviction for contempt committed by a lawyer-witness and approved a refusal to grant a continuance, saying:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time

that violates due process even if the party fails to offer evidence or is compelled to defend without counsel."

Applying those principles to the case at bar, we find a direct contempt committed by an attorney in the presence of the Trial Judge, the absence of any adversary relationship between the Trial Judge and the attorney as a result of the contemptuous language, and prompt punishment of the contempt after affording the attorney an opportunity to be heard by way of defense and mitigation. The conduct of the Trial Judge, duly reviewed by the Louisiana Supreme Court and approved by it, does not fail with regard to any of the constitutional tests previously announced by this Court. Application for writ should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing Brief in Opposition have this day been mailed, postage prepaid, to Antoine Laurent, 1025 Mill Street, Lake Charles, LA 70601 and Louis Guidry, 700 Enterprise Blvd., Lake Charles, LA 70601.

This ____ day of May, 1978.

Of Counsel